Supreme Court, U.S.
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No. 14-857

IN THE
Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus curiae addresses the following two questions:

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Procedure 23, but receives an offer of complete relief before any class is certified.

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.[1]

To that end, WLF has frequently appeared in this and other federal courts to urge the judiciary to abide constitutional limitations on its power to exercise subject matter and/or personal jurisdiction over parties and proceedings. *See, e.g., Spokeo, Inc. v. Robins*, No. 13-1339, *cert. granted*, 135 S. Ct.1892 (2015); *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2946 (2011).

The limitations on judicial power set forth in Article III of the Constitution ensure that federal courts confine themselves to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 92 (1968). WLF does not believe that enforcement of those limitations is of diminished importance simply because the parties to litigation possessed a sufficiently adversarial relationship at the time a suit was filed. When, as here, the adversarial relationship between the parties

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

ceases to exist before the lawsuit is concluded, a federal court's jurisdiction over the proceedings also ceases to exist.

WLF is concerned that the decision below is based on a basic misunderstanding of Article III's "Cases" and "Controversies" requirement and, if affirmed, would aggrandize judicial power at the expense of the other branches of government.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Petitioner. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Respondent Jose Gomez contends that he suffered an injury when Petitioner Campbell-Ewald Co. in 2006 arranged for a third-party vendor to send him one or more unsolicited text messages urging Gomez to consider joining the U.S. Navy. Gomez contends that Campbell-Ewald's actions violated a provision of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(1)(A)(iii), which prohibits use of an automatic telephone dialing system to call a cell phone.

The TCPA provides for enforcement of the prohibition both by the Federal Communications Commission and state attorneys-general. 47 U.S.C. §§ 227(b)(2), 227(g)(1). It also creates a private right of action for individuals injured by violations of § 227(b)(1); such individuals may seek to enjoin the violations and to recover the greater of actual damages

or $500 per violation. 47 U.S.C. § 227(b)(3).[2]

In addition to seeking an award of damages for himself, Gomez sought to represent a class consisting of thousands of other individuals who allegedly received Navy-recruitment text messages at the behest of Campbell-Ewald. Complaint ¶¶ 20-27, JA-20 to JA-22. The complaint also sought an injunction requiring Campbell-Ewald "to cease all wireless spam activities" and an award of "reasonable attorneys' fees and costs." JA-23.

Before Gomez even filed a motion for class certification, Campbell-Ewald sought to end the lawsuit by giving Gomez all the relief he requested. It offered to pay him $1503 for the one Navy-recruitment text message he claimed to have received, and an additional $1503 for any other similar text message he might in good faith claim to have received.[3] It also offered to pay all reasonable costs and to stipulate to an injunction prohibiting Campbell-Ewald from engaging in the alleged wrongs. Pet. App. 38a-39a. Campbell-Ewald's January 11, 2010 offer to provide Gomez with all the relief he requested for himself took two forms: (1) a notice of offer of judgment filed with the district

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[2] If the court determines that the defendant "willfully or knowingly" violated § 227(b)(1)(A)(iii), it may at its discretion triple the amount otherwise awardable to the plaintiff. *Id.*

[3] Although the TCPA provides for statutory damages of $500 per violation, Campbell-Ewald offered $1,503 per text message, presumably in recognition of the fact that the complaint alleged that Campbell-Ewald acted "willfully" and "knowingly," and that the TCPA authorizes treble damages for willful or knowing violations.

court pursuant to Fed.R.Civ.P. 68 (the "Rule 68 Offer"); and (2) a Settlement Offer directed to counsel for Gomez. *Ibid.*

After Gomez refused to accept the proffered cash, Campbell-Ewald moved to dismiss the complaint, arguing that its offer of complete relief meant that the lawsuit no longer presented an Article III "Case" or "Controversy" and thus that the district court lacked jurisdiction to issue a ruling on the merits of Gomez's claims. The district court recognized that Campbell-Ewald had offered complete relief to Gomez. *Id.* at 40a ("The parties do not dispute that Defendant's Rule 68 Offer would have fully satisfied the individual claims asserted, or that could have been asserted."). It nonetheless denied the motion and granted Gomez's motion to strike the Rule 68 Offer. *Id.* at 40a-49a. The court later granted summary judgment to Campbell-Ewald, finding that Campbell-Ewald was immune from TCPA liability under the doctrine of derivative sovereign immunity. *Id.* at 22a-34a.

The Ninth Circuit reversed the grant of summary judgment, finding that Campbell-Ewald's status as a Navy contractor did not entitle it to share in the Navy's immunity from suit. Pet. App. 1a-21a. Before reaching the immunity issue, the appeals court considered and rejected Campbell-Ewald's contention that its offer of complete relief to Gomez rendered his claims moot and deprived the federal courts of jurisdiction to address the merits of his claims. *Id.* 4a-7a.

Although the appeals court did not contest that Campbell-Ewald offered to provide Gomez all the relief

to which he was entitled, the court held that the Rule 68 Offer did not moot his individual claims because Gomez had rejected that offer and, "An unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Id.* at 5a (quoting *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)). The court did not separately discuss the Settlement Offer or consider whether the Settlement Offer was sufficient to render the claim moot.

The appeals court also held that Gomez's putative class claims were not moot. *Id.* at 5a-7a. The court recognized that this Court recently held that when a plaintiff's individual claims become moot and no other plaintiffs have been added to his lawsuit, Article III's case-or-controversy requirement requires dismissal of the suit notwithstanding his claimed right to represent similarly situated individuals who might also wish to raise wage-and-hour claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* *Id.* at 6a (citing *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2013)). It further conceded that *Genesis* "undermined some of the reasoning" employed by *Diaz* and other Ninth Circuit precedent on which it relied. *Ibid.* The appeals court nonetheless concluded that "because *Genesis* was not 'clearly irreconcilable'" with Ninth Circuit precedent, "this panel remains bound by circuit precedent, and Campbell-Ewald's mootness arguments [with respect to the putative class claims] must be rejected." *Id.* at 7a.

SUMMARY OF ARGUMENT

Gomez's individual claims for relief became moot once Campbell-Ewald unconditionally offered to provide him with all of his requested relief. Once that unconditional offer was made, an actual controversy between the parties ceased to exist, and the federal courts were thereby deprived of jurisdiction to issue a ruling on the merits of Gomez's claims. This Court has repeatedly explained that, for a federal court to maintain Article III jurisdiction over a matter, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

Campbell-Ewald's unconditional offer deprived the district court of jurisdiction to decide legal issues arising under the TCPA because the parties no longer had a personal stake in the resolution of those issues; any such decision would have been purely advisory in nature. As explained below, the district court nonetheless continued to be empowered to engage in a broad range of conduct; but after Campbell-Ewald extended its offer, Article III barred consideration of any issue touching on the merits of Gomez's TCPA claims.

The Ninth Circuit erred by focusing solely on the Rule 68 Offer to the exclusion of the Settlement Offer. Its determination that Rule 68 offers are not unconditional is not implausible; the Rule 68 Offer extended by Campbell-Ewald expressly provided that it "shall be deemed withdrawn unless written notice of acceptance is received within fourteen days of service."

Pet. App. 54a. Inclusion of that 14-day condition was consistent with the provisions of Rule 68(a) and (b). But it does not matter whether the Rule 68 Offer *by itself* moots the case. Campbell-Ewald *also* extended an unconditional Settlement Offer which, as the district court found, fully satisfied the individual claims asserted by Gomez.

Gomez asserts that the Settlement Offer is a nullity because he refused to accept the cash that Campbell-Ewald attempted to pay him. That assertion is without merit. Once Campbell-Ewald attempted to make him whole, Gomez lacked the standing necessary to maintain federal court jurisdiction over his TCPA claims. In particular, any injury-in-fact he continued to suffer was not fairly traceable to emails allegedly sent to him at the behest of Campbell-Ewald. Rather, any continuing injury was the result of his refusal to accept a check from Campbell-Ewald.

It should not matter that Campbell-Ewald never actually mailed a check to counsel for Gomez. Even if Campbell-Ewald had mailed a check, it could not have forced counsel to cash the check, any more than it could have forced counsel to place proffered dollar bills in his pocket. The salient features of the Settlement Offer were that it was unconditional and enforceable. Once that unconditional offer was extended—and brought to the attention of the district court by means of the Rule 68 Offer—Campbell-Ewald had taken all realistic steps necessary to fully satisfy Gomez's individual claims.

The Solicitor General argued in *Genesis* (as an *amicus curiae*) that once an individual claimant suffers a retrospective injury that is directly traceable to

another's alleged wrongdoing, that injury claim cannot be rendered moot unless the claimant agrees to settle the claim. While conceding that changed conditions can moot claims arising from prospective injury (such as claims for injunctive relief), the Solicitor General argued that a retrospective injury can never be erased; that a claimant is entitled to refuse offers of complete relief and instead to insist that a federal court address the merits of his claims. The Court's Article III case law has explicitly rejected that argument. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998). Nor has the Solicitor General adequately explained why mootness doctrine should not apply to claims arising from retrospective injury to the same extent that it applies to claims arising from prospective injury.

The Ninth Circuit held alternatively that, even if Gomez's individual claims were rendered moot by Campbell-Ewald's offers, his claims for class relief should survive. Gomez concedes that he had not even filed a motion for class certification at the time that Campbell-Ewald agreed to satisfy all his individual claims. Gomez nonetheless asserts that a Case or Controversy continues to exist because if a class is certified, "the ultimate certification of the class may relate back to the filing of the complaint." Opp. Br. at 17.

Genesis considered and rejected a virtually identical argument. *Genesis* considered whether an action brought under the FLSA "remained justiciable" after the plaintiff's own claims became moot. *Genesis*, 133 S. Ct. at 1529. Even though the FLSA provides individual claimants with a statutory right to bring an

action on behalf of similarly-situated employees, the Court held, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Ibid.* That reasoning is equally applicable to Gomez's claimed right to represent a nationwide class of text message recipients under Rule 23. Unless a Rule 23 class has been certified, no putative class members are parties to the suit, and thus no individual possesses the personal stake in the controversy necessary to maintain an Article III proceeding.

It is the function of the Executive Branch—not the judiciary—to "take Care that the Laws be faithfully executed." U.S. Const., Article II, § 3. The TCPA directs the FCC (with the assistance of state attorneys-general) to ensure that the provisions of the TCPA are enforced. It is the role of the judiciary, on the other hand, to decide actual "Cases" and "Controversies." Article III's narrow limits on federal court jurisdiction are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It is not the role of the federal courts—contrary to what the Ninth Circuit apparently believes—to stretch the limits of Article III jurisdiction in order to ensure strict enforcement of the TCPA in those instances in which a defendant has mooted an existing TCPA controversy by providing complete relief to a claimant. Rather, in the absence of a continuing "Case" or "Controversy," separation-of-powers concerns require courts to leave enforcement of the TCPA in the hands of the Executive Branch.

ARGUMENT

I. GOMEZ's INDIVIDUAL CLAIMS FOR RELIEF BECAME MOOT ONCE CAMPBELL-EWALD UNCONDITIONALLY OFFERED TO PROVIDE HIM WITH ALL OF HIS REQUESTED RELIEF

On January 11, 2010, Campbell-Ewald agreed to provide Gomez all the substantive relief he requested for himself in this lawsuit, including all damages and costs and an injunction against future violations of the TCPA by Campbell-Ewald. Indeed, as the district court found, the parties "do not dispute" that Campbell-Ewald's offer "fully satisfied" all of Gomez's individual claims. Pet. App. 40a. Once that offer was made, an actual controversy ceased to exist with respect to Gomez's individual claims, thereby depriving the district court of jurisdiction to adjudicate the merits of those claims.

A. Article III Jurisdiction to Decide the Merits of a Claim Ceases Once an Actual Controversy No Longer Exists

Article III, § 2 of the Constitution confines federal courts to the decision of "Cases" or "Controversies." As the Court has repeatedly explained, "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Both standing and mootness are aspects of the case-or-controversy requirement.

The Court has explained Article III's standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. . . . First, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co., 523 U.S. at 102-103 (citations omitted). The standing requirement ensures that the plaintiff possesses a "personal stake" in the outcome of the litigation, *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009), and that a federal court is not simply being asked to provide an advisory opinion that does not decide any actual controversy.

The mootness doctrine ensures that the requisites for maintaining federal court jurisdiction continue to exist throughout the litigation. *Arizonans for Official English*, 520 U.S. at 67 ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis*, 133 S. Ct. at 1528 (quoting *Lewis v. Continental Bank Corp.*, 494

U.S. 472, 477-78 (1990)). The Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English*, 520 U.S. at 68 n.22 (citations omitted).

Importantly, a federal court's determination that it no longer possesses jurisdiction over a matter does not mean that it lacks the power to take any further actions. For example, it unquestionably has authority to issue an order declaring that it lacks jurisdiction. 13A Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3536 at 535 (1984). Federal courts routinely enter consent judgments requested by the parties, even though the parties' request is a clear indication that they have settled their differences and that no actual controversy remains. The court may also entertain a request that the opposing party be made to pay costs and attorney's fees arising from the proceedings. *Willy v. Coastal Corp.*, 503 U.S. 131, 135-36 (1992).

Indeed, this Court has directed lower federal courts, when a case becomes moot, to dispose of the case in the manner "most consonant to justice in view of the nature and character of the conditions which caused the case to become moot." *U.S. Bancorp Mort. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (citations omitted). But Article III absolutely prohibits a federal court from addressing the merits of a plaintiff's claim following a determination that an actual controversy no longer exists. *Steel Co.*, 523 U.S. at 101-02 ("For a court to pronounce upon the meaning

or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.").

B. The Settlement Offer Was an Unconditional Offer to Provide All Requested Relief, Which Ended Any Actual Controversy Between the Parties

It is impossible to identify any actual controversy that existed between the parties after Campbell-Ewald extended its Settlement Offer on January 11, 2010. Gomez's complaint sought, in his individual capacity, an award of damages and an injunction requiring Campbell-Ewald "to cease all wireless spam activities." JA-23. The Settlement Offer unconditionally agreed to meet those demands in full:

> C-E hereby offers to pay Mr. Gomez the sum of $1503 for each and every unsolicited text message that was allegedly sent by or on behalf of C-E to any cell phone owned by Mr. Gomez or for which Mr. Gomez was the subscriber or the person responsible for payment. The complaint identifies only a single text message on May 11, 2006, and we are not aware of any other text messages sent to Mr. Gomez by or on behalf of C-E. Please identify any additional unsolicited text messages that Mr. Gomez alleges that he received on his cell phone in the "several months" following May 11, 2006, so that I may arrange for payment. C-E further agrees as part of its settlement offer to the entry of a stipulated injunction as sought in Mr. Gomez's

> complaint. Specifically, C-E will stipulate to an injunction prohibiting it from the alleged "wireless spam activities," *viz*, sending unsolicited commercial text messages to cellular telephones unless the subscriber has consented to receive such text messages or the TCPA permits such text messages to be sent.

Pet. App. 58a-59a.

The compensatory and injunctive relief offered by Campbell-Ewald fully satisfied the demands set forth in Gomez's complaint. Indeed, the district court ruled that Gomez "does not dispute" that the offer "would have fully satisfied the individual claims asserted, or that could have been asserted." *Id.* at 40a. In the absence of an actual controversy regarding the damages and injunctive relief to which Gomez is entitled, his individual claims are moot. *California v. San Pablo & T. R. Co.*, 149 U.S. 308, 313-14 (1893) (holding that "the cause of action has ceased to exist" because "[a]ny obligation of the defendant to pay to the state the sums sued for in this case has been extinguished by the offer to pay all these sums.").

A plaintiff who files a lawsuit makes a set of demands on the defendant. When the defendant responds by agreeing to meet those demands in full, he has, in effect, accepted the plaintiff's terms of settlement. Of course, if a defendant attaches conditions to his agreement, he has made a counter-offer that the plaintiff is free to reject—a rejection that would render the defendant's offer a nullity. Accordingly, in determining whether a party's offer of complete relief renders the case moot, the Court has

often focused on whether the offer is *unconditional*.

For example, in *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013), an athletic footwear company (Nike) brought a trademark infringement action against a competitor (Already), and Already filed a counterclaim contending that Nike's trademark was invalid. Nike then moved to dismiss its claims and issued a "covenant not to sue," promising not to raise any future trademark or unfair competition claims against Already. The Court held (over Already's objections) that the covenant not to sue mooted Already's invalidity counterclaim because Nike carried its burden of demonstrating that its allegedly wrongful conduct could not reasonably be expected to recur. *Id.* at 732.

In reaching that conclusion, the Court focused primarily on the "unconditional and irrevocable" nature of Nike's covenant not to sue, *id.* at 728, and Already's failure to point to any inadequacies in the covenant. *Id.* at 729. The Court noted that "Already's argument is not that the covenant could be drafted more broadly, but instead that no covenant would ever do," *id.* at 732—that is, Already argued that it should be permitted to proceed to judgment on its trademark invalidity counterclaim rather than being forced to accept an unconditional promise from Nike never to file another trademark infringement lawsuit. The Court rejected that argument and declared the case moot.

In contrast, the Court has rejected suggestions of mootness when a party's purported offer to fully satisfy the opposing party's damage claims was not unconditional. Thus, in *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277 (2012), the defendant sought to

moot all claims by sending out a notice to class members—after this Court granted certiorari—offering a full refund. The Court held that the defendant's offer did not moot the case because the offer was not unconditional. *Id.* at 2287-88. The Court cited evidence that notice of the refund offer included "a host of conditions, caveats, and confusions as unnecessary complications aimed at reducing the number of class members who claim a refund." *Id.* at 2287.

Campbell-Ewald's Settlement Offer is unequivocally unconditional. It does not quibble over any terms of payment; instead, it merely asks that Gomez specify how many text messages he received "so that [counsel for Campbell-Ewald] can arrange for payment" of $1503 per text message. Pet. App. 58a. By offering unconditionally and irrevocably to fully satisfy Gomez's individual claims for relief (including the payment of treble damages, which are normally available only if the plaintiff demonstrates willful misconduct), Campbell-Ewald eliminated any actual controversy between the parties and thereby rendered this case moot.

The Ninth Circuit focused on Campbell-Ewald's Rule 68 Offer. Pet. App. 4a-5a. Noting that Gomez did not accept the Rule 68 Offer, the appeals court held, "An unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot." *Id.* at 5a (quoting *Diaz*, 732 F.3d at 950). But Campbell-Ewald's mootness claims rest to a significant degree on the Settlement Offer. By failing to make any mention of the Settlement Offer, the Ninth Circuit did not even begin to come to grips with those claims.

The Rule 68 Offer contained one important condition: by its terms, it was to "be deemed withdrawn unless written notice of acceptance is received within fourteen days of service." Pet. App. 54a.[4] Gomez did not provide any written notice of acceptance, and thus the Rule 68 Offer was deemed withdrawn on January 25, 2010. Because the Rule 68 Offer attached a condition to its offer to fully satisfy Gomez's claims, one could argue the Rule 68 Offer might not *by itself* have mooted the case. But by simultaneously extending the Settlement Offer—which *unconditionally* offered to fully satisfy all of Gomez's individual claims—Campbell-Ewald entirely eliminated any actual controversy between the parties. The Rule 68 Offer served one important function: it alerted the district court that Campbell-Ewald no longer contested Gomez's claims for individual relief and thereby invited the court to enter judgment for Gomez and close the case.

Gomez notes that he has not actually received a check from Campbell-Ewald. But Campbell-Ewald has done all that it can realistically do to fully satisfy Gomez's individual claims. It offered a broadly worded injunction, and Gomez has not raised any objections to the language of the injunction. Pet. App. 60a-61a. It made clear that it will make "prompt payment" of $1503 for each text message Gomez in good faith alleges he received, *id.* at 58a-59a, and that it will also pay all of Gomez's court costs. *Id.* at 58a.

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[4] Inclusion of that condition was consistent with the terms of Rule 68(a) and (b), which state that a Rule 68 offer may be accepted at any time "within 14 days of being served" and that "[a]n unaccepted offer is considered withdrawn."

It is irrelevant that Campbell-Ewald did not take the extra step of mailing a check to counsel for Gomez. Even if Campbell-Ewald had mailed a check, it could not have forced counsel to cash the check, any more than it could have forced counsel to place proffered dollar bills in his pocket. Indeed, Gomez's counsel repeatedly made clear that he would not accept any check sent to him. The salient features of the Settlement Offer were that it was unconditional and enforceable. Once that unconditional offer was extended—and brought to the attention of the district court by means of the Rule 68 Offer—Campbell-Ewald had taken all realistic steps necessary to fully satisfy Gomez's individual claims for mootness purposes.

This Court has never indicated that a mootness determination hinges on evidence that the defendant actually sent the plaintiff a check fully satisfying the plaintiff's claims. For example, in *Knox*, the defendant (in an effort to moot the lawsuit) sent out a notice offering a full refund (the relief sought in the lawsuit) to all class members. But no checks were sent unless a class member responded to the notice by requesting a refund. Although the Court ultimately rejected the defendant's claim that the refund offer mooted the lawsuit, it never suggested that the defendant's failure to send checks cut against a mootness finding. *Knox*, 132 S. Ct. at 2287-88.

Finally, Gomez argues that the case is not moot because the complaint requests an award of attorney's fees, and Campbell-Ewald has not offered to pay any attorney's fees. But the Court held in *Lewis* that Article III's case-or-controversy requirement is not satisfied where the only controversy between the

parties is a claim for attorney's fees. *Lewis*, 494 U.S. at 480. In any event, even if this case is dismissed as moot, Gomez will be at liberty to file a motion for attorney's fees with the district court. Although a mootness determination would deprive the district court of jurisdiction to address the merits of Gomez's TCPA claims, the court would retain jurisdiction to determine whether attorney's fees are awardable for work performed during the course of the lawsuit. *Willy v. Coastal Corp.*, 503 U.S. 131 (1992); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393-98 (1990); *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 926-28 (7th Cir. 2000). Any claim for attorney's fees seems far-fetched in light of the absence of a fee provision in the TCPA, but Campbell-Ewald's Offer of Settlement does not preclude Gomez from asserting such a claim.[5]

C. A Plaintiff May Not Keep a Controversy Alive by Refusing to Accept Full Settlement; Any Remaining Injury Is Traceable to the Refusal, Not to the Alleged Wrongdoing

While not contesting that Campbell-Ewald's Settlement Offer would have fully satisfied his individual claims if accepted, Gomez asserts that his rejection of the offer was the end of the matter. He

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[5] Lawsuits like these are almost always lawyer-driven, and a desire to generate fees for Gomez's attorneys is likely what prompted this litigation in the first place. Counsel's desire to extend proceedings for the purpose of generating larger fees is not, of course, a reason to ignore mootness concerns.

asserts that "[t]he offer, like any other contract offer, became a nullity when rejected." Respondent Opp. Br. at 4 n.2. That contention is without merit and is directly contrary to the Court's holding in *California v. San Pablo & T.R. Co.*, 149 U.S. at 313-14.

To avoid a mootness determination, Gomez must demonstrate that he continues to satisfy the three prerequisites for an Article III "Case" or "Controversy." He must demonstrate: (1) an injury-in-fact; (2) fairly traceable to the complained-of conduct; and (3) a likelihood that the requested relief would redress his alleged injury. *Steel Co.*, 523 U.S. at 102-103. Even if one assumes that a plaintiff who has received an unconditional offer of complete relief can continue to assert injury, the plaintiff could not meet the other two requirements.

In particular, when the defendant has offered to fully satisfy the plaintiff's claims, any remaining "injury" would *not* be fairly traceable to the complained-of conduct of the defendant. Rather, such injury results from the plaintiff's refusal to accept payment from the defendant. Gomez has received an unconditional Settlement Offer that fully satisfies the demands asserted in his complaint; under those circumstances, an actual controversy no longer exists because any injury can only be fairly traced to Gomez's decision not to accept the proffered payment.[6]

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[6] Moreover, his refusal to accept proffered payments implicates the third requirement: whether his injury-in-fact would be redressed by his requested relief. All individual claims asserted (or that could have been asserted) by Gomez are fully satisfied under the terms of the Settlement Offer, yet Gomez's refusal to

In *Genesis*, the Solicitor General filed an *amicus curiae* brief urging the Court to hold that an offer to fully satisfy a plaintiff's individual claims does not moot the plaintiff's claims if it is not accepted. While conceding that changed conditions can moot claims arising from prospective injury (such as claims for injunctive relief), the Solicitor General argued that a retrospective injury can never be erased; a claimant is entitled to refuse offers of complete relief and instead to insist that a federal court address the merits of his claims. Brief for the United States in *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059 (Oct. 17, 2012), at 13 n.1.

There is little to recommend the Solicitor General's suggested approach. Under that theory, if an individual makes a required payment (including any necessary interest) one day late, his creditor can claim to have been injured, refuse to accept the payment, file suit for the "unpaid" debt, and force the court to consider the merits of his breach-of-contract claim. The Government assured the Court that that type of situation would arise only infrequently because few plaintiffs who have been offered full payment would insist on a merits-based court judgment. *Genesis HealthCare Corp. v. Symczyk*, No. 11-1059, Oral Arg. Tr. at 48-51. But the issue is not the frequency with

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accept the offer suggests that the relief he requested would not redress the injury he alleges. If so, the absence of redressability provides an additional grounds to conclude that the federal courts lack jurisdiction to consider Gomez's damage claims.

which that type of situation would arise.[7] Rather, the issue is whether federal courts possess Article III jurisdiction to address the merits of claims asserted by a plaintiff who cannot demonstrate a personal stake in the resolution of the legal issues he asks the court to address. As explained above, the answer to that question is clearly, "No."[8]

The Court in at least one instance has explicitly rejected the view that changed circumstances cannot dissipate the standing of a plaintiff who has suffered retrospective injury. In *Steel Co.*, an environmental organization filed a lawsuit against a company that failed to report the presence of hazardous chemicals at its facilities, in violation of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §11001, *et seq.* In accordance with EPCRA's citizen-suit provision, the plaintiff provided the company with 60 days' advance notice of its intent to file suit. Upon receiving the notice, the company

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[7] WLF does take issue with the United States's frequency assessment, however. If Gomez prevails in this proceeding, WLF foresees that numerous plaintiffs who are offered full payment will reject the offer for precisely the reason Gomez turned it down—they will do so based on their hopes (or their attorneys' hopes) that their cases will be certified as class actions.

[8] *Amicus* does not suggest that a plaintiff who refuses to accept an unconditional offer of complete relief should be left with nothing if the court subsequently determines that the offer has rendered the case moot. Rather, the district court could enter judgment for the plaintiff in the amount of the offer. *See, e.g., O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 575 (6th Cir. 2009). But what a district court may not do is reach the merits of the plaintiff's claims and thereby pronounce upon issues of law that it lacks jurisdiction to address.

promptly filed the overdue chemical reporting forms with the relevant agencies. By the time suit was filed, the company had come into compliance with EPCRA, but it was uncontested that the company had previously been out of compliance—and had thereby injured the plaintiff by depriving it of information about the presence of dangerous chemicals in the community.

The plaintiff sought a declaratory judgment that the defendant had violated EPCRA. The injury it sought to remedy through declaratory relief was clearly retrospective in nature. But the Court nonetheless held that the plaintiff lacked standing to seek declaratory relief because the defendant had already come into compliance with EPCRA and thereby revealed its former noncompliance, and thus declaratory relief would not redress the plaintiff's informational injury. *Steel Co.*, 523 U.S. at 106. The Court explained:

> There being no controversy over whether petitioner failed to file reports, or whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.

Id. A court's award of damages on the merits is similarly worthless to a plaintiff who has received from the defendant an unconditional offer to fully satisfy all his damage claims.

Nor has the Solicitor General adequately explained why mootness doctrine should not apply to claims arising from retrospective injury to the same

extent that it applies to claims arising from prospective injury. True, different considerations come into play when evaluating whether a claim for prospective relief has been rendered moot by changed circumstances following the commencement of the lawsuit. In such instances, a defendant that has ended its unlawful conduct during the course of litigation can establish the mootness of claims for prospective relief (*e.g.*, an injunction against future misconduct) only by "showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." *Already*, 133 S. Ct. at 727. In contrast, the likelihood of recurrence of wrongful behavior plays no role in determining whether claims for retrospective relief have become moot.

But the same underlying principles guide mootness determinations with respect to claims both for prospective relief and for retrospective relief: a case is moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* at 726. As the Court explained in determining that a plaintiff's claims for prospective relief (an injunction requiring a law school to admit him as a student and allow him to graduate) were moot because he was nearing graduation:

> A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel [graduation] and could not serve to prevent it. The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests."

DeFunis v. Odegaard, 416 U.S. 312, 317 (1974) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). Those factors are as applicable to claims for retrospective relief as they are to claims for prospective relief. They serve to underscore why the absence of an actual controversy between Gomez and Campbell-Ewald renders this case moot and bars the district court from addressing the merits of Gomez's TCPA claims.

II. GOMEZ's PUTATIVE CLASS CLAIMS ARE ALSO MOOT IN THE ABSENCE OF A CERTIFIED RULE 23 CLASS

The Ninth Circuit held alternatively that, even if Gomez's individual claims were rendered moot by Campbell-Ewald's offers, his claims for class relief should survive. Gomez concedes that he had not even filed a motion for class certification at the time that Campbell-Ewald agreed to satisfy all his individual claims. Gomez nonetheless asserts that a Case or Controversy continues to exist because, if a class is certified, "the ultimate certification of the class may relate back to the filing of the complaint." Opp. Br. at 17.

Campbell-Ewald's opening brief cogently explains why Gomez's claims for class relief are moot. WLF will not repeat those arguments here. We nonetheless wish to emphasize several points.

First, Gomez's arguments regarding why its claims for class relief should survive were addressed and rejected in *Genesis*. That case considered whether an action brought under the FLSA "remained

justiciable" after the plaintiff's own claims became moot. *Genesis*, 133 S. Ct. at 1529. Even though the FLSA provides individual claimants with a statutory right to bring an action on behalf of similarly-situated employees, the Court held, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Ibid.*

That reasoning is equally applicable to Gomez's claimed right to represent a nationwide class of text message recipients under Rule 23. Unless a Rule 23 class has been certified, no putative class members are parties to the suit, and thus no individual possesses the personal stake in the controversy necessary to maintain an Article III proceeding. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980), suggests that Gomez might have had a plausible basis for resisting mootness if the district court had considered and denied a motion for class certification prior to Campbell-Ewald's Settlement Offer. But when Campbell-Ewald submitted its unconditional offer to Gomez in 2010, Gomez had not yet even filed a motion for class certification.

Second, the Solicitor General's brief in *Genesis* strongly supports Campbell-Ewald's position regarding the mootness of Gomez's class claims. U.S. Br. at 25-33. In response to the claim of the plaintiff in *Genesis* that the case could remain "live" on the basis of her assertion that she was entitled to represent fellow employees in a collective action, the Solicitor General disagreed, stating, "If no additional plaintiffs opt in before the named plaintiff's personal claim expires, then without more the action will have already lost its

live status." *Id.* at 29. The Solicitor General's analysis regarding the mootness of an FLSA collective action into which no additional plaintiff has opted applies equally to a putative class action in which a Rule 23 motion for class certification has not been granted.

Finally, the important role that the case-or-controversy requirement plays in ensuring separation of powers among the three branches of government cannot be overemphasized. The requirement "ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes." *Genesis*, 133 S. Ct. at 1528. It is "a crucial and inseparable element" of the separation-of-powers principles embedded in the Constitution, "which successively describe where the legislative, executive, and judicial powers, respectively, shall reside." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983).

It is the function of the Executive Branch—not the judiciary—to "take Care that the Laws be faithfully executed." U.S. Const., Article II, § 3. The TCPA directs the FCC (with the assistance of state attorneys-general) to ensure that the provisions of the TCPA are enforced. 47 U.S.C. §§ 227(b)(2), 227(g)(1). It is the role of the judiciary, on the other hand, to decide actual "Cases" and "Controversies." Article III's narrow limits on federal court jurisdiction are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It is not the role of the federal courts—contrary to what the Ninth Circuit apparently believes—to stretch the limits of Article III jurisdiction

in order to ensure strict enforcement of the TCPA in those instances in which a defendant has mooted an existing TCPA controversy by providing complete relief to a claimant.[9] Rather, in the absence of a continuing "Case" or "Controversy," separation-of-powers concerns require courts to leave additional enforcement of the TCPA in the hands of the Executive Branch.

Gomez asserts that Rule 23 grants him rights to assert claims on behalf of similarly situated consumers.[10] But the Federal Rules of Civil Procedure cannot authorize the federal courts to exercise powers that Article III of the Constitution prohibits them from exercising. As the Court has explained:

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[9] In light of the "cottage industry of attorneys" responsible for "a rising tide of class action suits under the TCPA," Pet. Br. at 4, there is little danger that the ability of consumers to vindicate their rights under the TCPA will be threatened by the occasional case in which a defendant "picks off" a potential class representative by paying his claim in full before he can move for class certification. But even if that danger were real, Congress and the FCC (not the courts) are the appropriate bodies to assess such concerns and to consider any appropriate responses (such as altering the amount of statutory damages available).

[10] WLF notes, in passing, that there is a serious question whether Gomez could ever effectively represent the interests of absent class members in a Rule 23 class. Presumably, the vast majority of class members would be pleased to accept a defendant's offer to fully satisfy their TCPA claims. Gomez's rejection of the unconditional Settlement Offer suggests that he is willing to subordinate his interests in complete recovery to other litigation-related interests, such as higher attorney's fees. A class member whose interests thus diverge so significantly from those of other class members is a far-from-ideal class representative.

> [F]ederal courts, in adopting rules, [are] not free to extend or restrict the jurisdiction conferred by a statute. . Such a caveat applies *a fortiori* to any effort to extend by rule the judicial powers of the United States described in Article III of the Constitution. The Rules, then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III.

Willy, 503 U.S. at 135.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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